

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE GUADALUPE DELGADILLO

Claimant

VS.

**FORREST ENERGY, LLC, and
WARREN DRILLING, LLC**

Respondents

AND

COMMERCE & INDUSTRY INSURANCE COMPANY)

Insurance Carrier

Docket No. 1,036,705

ORDER

Warren Drilling, LLC, and its insurance carrier Commerce & Industry Insurance Company appealed the November 15, 2007, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

This is a claim for a December 5, 2005, accident. Following a preliminary hearing at which only claimant appeared, Judge Clark entered the November 15, 2007, Order awarding claimant workers compensation benefits.

In their Application for Review, Warren Drilling, LLC, (Warren) and its insurance carrier requested review of the following issues: whether claimant was injured in an accident that arose out of and in the course of his employment with respondent; whether claimant provided respondent with timely notice of his accident; whether claimant was an employee of respondent at the time of the accident; and whether the respondent was insured by Commerce & Industry Insurance Company on the date of accident. But in their appellate brief filed with the Board, Warren and its insurance carrier indicated the only issue on this appeal was whether the November 15, 2007, Order should be reversed on the basis that Warren's due process rights were violated as it did not receive notice of the November 15, 2007, preliminary hearing.

Claimant did not file an appellate brief despite the Board's request. Accordingly, the Board does not have the benefit of claimant's arguments for purposes of this appeal.

As indicated above, the only issue before the Board on this appeal is whether the November 15, 2007, Order should be reversed or set aside on the basis that Warren was denied due process as it did not receive notice of the preliminary hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned finds and concludes this claim should be remanded to the Judge to provide the parties an opportunity to present any relevant evidence on the issues enumerated below.

The facts are relatively straightforward. Claimant initiated this proceeding naming Forest *[sic]* Energy, LLC, d/b/a Warren Drilling, LLC, as the employer.¹ Claimant later testified at the preliminary hearing that he was employed by Forrest Energy on the date of the alleged accident, December 5, 2005, and that Warren later purchased Forrest Energy.

Although Forest *[sic]* Energy, LLC, d/b/a Warren Drilling, LLC, was named as the employer in the application for hearing filed with the Division of Workers Compensation on September 20, 2007, the Division began generating notices to the parties showing only Warren Drilling, LLC, as the employer. The Division's file does not explain why Forrest Energy, LLC, has not been included as a named party in these proceedings. Moreover, although the application for hearing stated the employer's address was 119 E. Third St., Pratt, Kansas 67124, the Division sent the employer's copies of the notices generated by the Division to celliot@warrendrilling.com, 905 W. 4th Ave., Hutchinson, Kansas 67501-5009.

Claimant later presented three amended applications to the Division of Workers Compensation to correct the name of the city where the accident occurred and to modify the date of the alleged accident. Two of those applications modified the name of the employer to Forest *[sic]* Energy, LLC, d/b/a Warren Drilling, Inc.

Based on the numerous applications for hearing that claimant has filed, the employer is either Forrest Energy, LLC, d/b/a Warren Drilling, LLC, or Forrest Energy, LLC, d/b/a Warren Drilling, Inc. The administrative file compiled by the Division of Workers Compensation provides no explanation why Forrest Energy, LLC, was dropped from the caption of this claim.

¹ When referencing Forrest Energy, LLC, in the application for hearing and the three amended applications, claimant actually referred to *Forest* Energy, LLC, but the undersigned believes that was merely a typographical error.

On October 10, 2007, the Division of Workers Compensation received an entry of appearance from attorney Jon E. Newman. The body of the document indicated Mr. Newman was entering his appearance on behalf of Forrest Energy, LLC, and insurance carrier Illinois National Insurance Company (Illinois). The document's caption indicated Warren Drilling, LLC, was the respondent and Commerce & Industry Insurance Company was the insurance carrier and Mr. Newman signed the document as the attorney for "Respondent and Insurance Carrier."

But one week later, on October 17, 2007, Mr. Newman mailed to Judge Clark a Motion to Withdraw as counsel of record for Forrest Energy, LLC, and insurance carrier Illinois National Insurance Company. The motion's caption listed Warren Drilling, LLC, and Commerce & Industry Insurance Company as the respondent and insurance carrier. Nothing in the body of the motion addressed Warren Drilling, LLC. Again, Mr. Newman signed the document as attorney for "Respondent and Insurance Carrier." Besides sending a copy of the motion to claimant's attorney, copies also went to Sherry Hembree at Forrest Energy, LLC, in Hutchinson, Kansas, and Warren Drilling, LLC, in Hutchinson, Kansas.

The same day Judge Clark received the motion to withdraw, October 18, 2007, the Judge signed the related order. It does not appear a hearing was held to address the motion. The order, which was entitled Order Granting Withdrawal of Counsel, granted Mr. Newman's request to withdraw as counsel for Forrest Energy, LLC, and Illinois National Insurance Company. Nothing in the body of the order addressed Warren Drilling, LLC, or Commerce & Industry Insurance Company, which were shown in the caption as the respondent and insurance carrier.

Thereafter, on October 19, 2007, claimant's attorney mailed a Notice of Preliminary Hearing for a November 15, 2007, preliminary hearing to Judge Clark and a copy to Mr. Newman. The Judge received that notice on October 23, 2007.

On November 15, 2007, claimant and his attorney appeared before Judge Clark for a preliminary hearing. There were no other appearances. Following the hearing, Judge Clark entered the November 15, 2007, Order in which the Judge awarded claimant both medical benefits and temporary total disability benefits if claimant is taken off work. The November 15, 2007, Order reads, in pertinent part:

1. This Court finds that the Claimant was injured out of and in the course of his employment with the Respondent on December 5, 2005, and the Respondent had notice of the Claimant's injuries.
2. Dr. Leonard Fleske is authorized as the Claimant's treating physician. All medical is ordered paid, including Claimant's Exhibit No. 3.

3. Temporary total disability payments are ordered paid if the Claimant is taken off work at a rate of \$467.00.

The Order does not specify whether payment is ordered against Forrest Energy, LLC; Warren Drilling, LLC; Warren Drilling, Inc.; or any combination of the above.

Warren and its insurance carrier now argue they did not receive notice of the preliminary hearing and, therefore, the Order should be set aside.

The Workers Compensation Act provides that applications for preliminary hearing shall be assigned to administrative law judges who shall set the matter for hearing and mail notice of hearing.

The director shall assign the application [for preliminary hearing] to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.²

In addition, Kansas Administrative Regulation (K.A.R.) 51-3-5a(c) provides:

In no case shall an application for preliminary hearing be entertained by the administrative law judge when written notice has not been given to the adverse party pursuant to K.S.A. 44-534a.

Consequently, it is implied that when written notice of a preliminary hearing has not been given, the judge lacks the authority to conduct the hearing and enter a preliminary award.

Before it can be determined whether the employer received notice of the November 15, 2007, preliminary hearing, the employer in this claim must first be identified. Claimant initiated this claim against Forrest Energy, LLC, d/b/a Warren Drilling, LLC. Although claimant testified Warren bought out Forrest Energy, the certificate of service attached to Mr. Newman's Motion to Withdraw indicates Forrest Energy was mailed a copy of the motion and, thus, there is an inference the company continues to exist. Consequently, the claim should be remanded to the Judge to provide the parties an opportunity to present evidence and address the following issues:

1. Who is the employer and appropriate respondent in this claim – Forrest Energy, LLC; Warren Drilling, LLC; or Warren Drilling, Inc.; or some other company?

² K.S.A. 44-534a(a)(1).

2. If Warren is the employer and respondent, did Mr. Newman enter his appearance for Warren by the manner he drafted and signed both his entry of appearance and the motion to withdraw as the attorney for “Respondent and Insurance Carrier” when Warren Drilling, LLC, was shown as the respondent in the captions of both documents? If so, did the October 18, 2007, Order entered by Judge Clark discharge Mr. Newman as the attorney for Warren and its insurance carrier?
3. Did Mr. Newman forward the notice of the November 15, 2007, preliminary hearing to the employer or otherwise notify the employer of that hearing? If not, did the employer or its agents receive notice of the hearing in some other manner?
4. Does Forrest Energy, LLC, continue to exist? If so, was it made a party when claimant named that company in his application for hearing? If so, has it been dismissed from this claim? If not, was the November 15, 2007, Order entered against Forrest Energy, LLC; Warren Drilling, LLC; Warren Drilling, Inc.; or some combination of the above?
5. Did the employer receive appropriate notice of the November 15, 2007, preliminary hearing? If not, should the November 15, 2007, Order be set aside for lack of due process?
6. All other issues that may arise in addressing Warren’s claims of lack of notice of the November 15, 2007, hearing and lack of due process.

Of course, counsel may eliminate much of the confusion and dispose of the above issues by stipulation.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, at this juncture the undersigned denies the request to set aside the November 15, 2007, Order entered by Judge Clark and remands the claim to the Judge for further proceedings as set forth above.

³ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of January, 2008.

KENTON D. WIRTH
BOARD MEMBER

- c: Roger A. Riedmiller, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent Warren Drilling, LLC, and its Insurance Carrier
Jon E. Newman, Attorney for Respondent and its Insurance Carrier
Forrest Energy, LLC, 410 Urban Drive, Hutchinson, KS 67501
John D. Clark, Administrative Law Judge